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April 26, 1996

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TELECOMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Mr. William Caton

Acting Secretary

Federal Communications Commission

1919 M Street, NW, Room 222

Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: CS Docket No. 96-40: Implementation Of Section 505
Of The Telecommunications Act Of 1996
Scrambling Of Sexually-Explicit Adult Video Service Programming

Dear Mr. Caton:

Enclosed for filing with the Commission please find an original and eleven copies of the Comments of Time Warner Cable and Home Box Office in the above-referenced proceeding. In accordance with the Public Notice dated March 22, 1996, two copies have been annotated as "Extra Public Copy."

If there are any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,



Seth A. Davidson

Enclosures

cc: Meryl Iove

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BEFORE THE
Federal Communications Commission

WASHINGTON, DC 20554

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APR 26 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 505 of) CS Docket No. 96-40
the Telecommunications Act of 1996)
)
Scrambling of Sexually Explicit Adult)
Video Service Programming)

COMMENTS OF TIME WARNER CABLE AND HOME BOX OFFICE

Time Warner Cable and Home Box Office (collectively "Time Warner"), divisions of Time Warner Entertainment Company, L.P., hereby submits their comments in the above-captioned proceeding.¹

I. Introduction.

The Notice in this proceeding seeks comment on certain issues raised by the enactment of Section 505 of the Telecommunications Act of 1996. Section 505 adds to the Communications Act a new Section 641, entitled "Scrambling of Sexually Explicit Adult Video Service Programming." Section 641(a) directs cable operators and other multichannel video programming distributors ("MVPDs") to "fully scramble or fully block" both the audio and video portions of any channel "primarily dedicated to sexually-oriented programming" so that a nonsubscriber does not receive such programming. Section 641(b) provides that, until a cable operator or other MVPD complies with the scrambling requirement described above,

¹In the Matter Of Implementation of Section 505 of the Telecommunications Act of 1996, Scrambling of Sexually Explicit Adult Video Service Programming, CS Docket No. 96-40, FCC 96-84 (rel. March 5, 1996) ("Notice").

such programming may not be provided during the hours of the day (as determined by the Commission) when a "significant number of children" are likely to view it. Section 641(c) defines the term "scramble" as used in Section 641 as follows: "to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner."

Time Warner notes that the constitutionality of Section 505 has been challenged on First Amendment and Equal Protection grounds and a United States District Court Judge has issued a Temporary Restraining Order enjoining the enforcement of Section 505 pending further proceedings.² Time Warner, which is not a party to the litigation challenging Section 505, wholeheartedly endorses Congress' desire to assist parents in ensuring that their children are not exposed to unwanted sexually explicit adult channels. However, we also share many of the general reservations expressed by the plaintiffs and the court regarding the constitutionality of content-based regulation of cable programming. In particular, given the availability of "lockbox" devices to subscribers upon request, Time Warner has considerable doubts as to whether the blocking and "safe harbor" obligations imposed on cable operators by Section 505 constitute the constitutionally-mandated "least restrictive means" of limiting the access of children to adult programming.³ Notwithstanding these concerns, Time Warner will assume for purposes of these comments that some additional measure of blocking and/or "safe harbor" requirements can constitutionally be imposed on channels

²Playboy Entertainment Group, Inc. et al. v. United States, C.A. No. 96-94/96-107 (D. Del. March 7, 1996).

³The provision of lockbox devices capable of preventing access to particular channels is mandated by Section 624(d)(2)(A) of the Communications Act, 47 U.S.C. § 554(d)(2)(A).

"primarily dedicated to sexually-oriented programming." Our comments will touch on three issues raised by the Notice: (1) the meaning of the term "channel . . . primarily dedicated to sexually-oriented programming"; (2) the scope of the requirement that a cable operator or other MVPD "fully scramble or otherwise fully block" sexually explicit programming or other indecent programming on channels primarily dedicated to sexually oriented programming; and (3) the application of the broadcast "safe harbor" standard to cable and other subscription services.

II. Section 505 Is Limited To Channels That Predominantly Program "Indecent" Material.

In the Notice, the Commission indicates its belief that the language of Section 505 precisely designates the channels as to which the blocking and safe harbor requirements of Section 641 apply. Notice at ¶¶ 6, 9. Time Warner believes a somewhat more accurate statement is that the terms of the statute clearly describe channels that are not subject to Section 641. In particular, Section 641 does not cover channels such as HBO, Cinemax, Showtime, and The Movie Channel, which offer a full range of programming aimed at a wide and varied audience. Rather, Time Warner believes that Section 641 applies only to services that predominantly feature programs that are "indecent."⁴ This narrow definition of

⁴The term "indecent" programming clearly does not encompass all programming that is oriented toward adult audiences. In this regard, Time Warner notes that many general audience programming services (including not only HBO and Cinemax, but even the Disney Channel) offer programs that have been rated "R" by the Motion Picture Association of America. Time Warner urges the Commission to take the opportunity presented by this proceeding to acknowledge that "indecency" under its rules does not equate to an "R" rating. The "R" rating applies to a wide range of motion pictures primarily intended for adult audiences, including many highly acclaimed, Academy Award-winning features such as "The Killing Fields."

the scope of Section 641 -- and the exclusion of services such as HBO and Cinemax from that section's ambit -- is evidenced by the plain language of Section 505 as well as by the enactment of a separate provision, Section 640, addressing the scrambling of channels other than those covered by Section 641.⁵

III. Cable Operators Should Be Accorded Flexibility In Choosing The Means Of Complying With the Section 505 Scrambling Requirement.

There are a number of ways that cable operators and other MVPDs may "fully" block or scramble the audio and video portions of the programming carried on their systems. Section 505 does not specify or otherwise limit the technology to be used in complying with the Section 641 scrambling requirement, and Time Warner urges the Commission to confirm that cable operators have broad discretion to select among the available means of fulfilling their statutory obligation.

In particular, the Commission should confirm that cable operators may employ blocking technologies that require the installation of equipment in the subscriber's home as a means of complying with Section 505. Such technologies include traps (which filter out designated channels), lockboxes (which prevent certain channels from being tuned), and mapping converters (which substitute alternative audio and video for the selected channel). Furthermore, the Commission should make clear that cable operators and other MVPDs may employ such technologies even if some subscribers refuse to permit the installation of the required equipment in their homes. It should be sufficient for the operator or other MVPD to notify the subscriber of the availability of, and offer to install, such equipment at the time

⁵See 47 U.S.C. § 560.

of initial service connection and at regular intervals thereafter.⁶ The fact that some subscribers refuse to allow the installation of necessary equipment should not render the cable operator's or MVPD's efforts noncompliant or require the deployment of different technological means of blocking the channels beyond what the cable operator determines is the best means for that system.

IV. The Commission Should Not Assume That Children Have The Same Access To Cable Programming As To Broadcast Programming.

The Notice proposes that, for purposes of limiting the availability of indecent programming on channels primarily dedicated to sexually-oriented programming that are not fully scrambled for nonsubscribers, the Commission apply the same 10 p.m. to 6 a.m. "safe harbor" as is applied to broadcast indecency. Notice at ¶ 8. In making this proposal, the Commission has tentatively concluded that "there are no relevant differences between broadcast and nonbroadcast delivery of programming that justify adoption of a different rule." Id. Time Warner submits that broadcasting and cable should not be equated for purposes of imposing content-based regulation such as scrambling and safe harbor requirements and that the Commission should not assume that children have the same access to cable programming as to broadcast programming.

The Commission's rationale in equating broadcast and cable for purposes of adopting "safe harbor" restrictions is that MVPDs, including cable, are available to a majority of

⁶Cf. 47 U.S.C. § 534(b)(7) (requirement that must carry signals be provided to all subscribers met where cable operator notifies subscribers of availability of converter box necessary to receive signals); see also Monterey Peninsula TV Cable, 98 FCC 2d 310, recon. denied, 98 FCC 2d 1281 (1984) (the decision of subscribers not to accept converter needed to receive must carry signals once they have been reasonably informed of its availability "cannot be said to be under the control of the cable operator").

homes and that the number of homes subscribing to cable and other MVPDs continues to increase. Id. This rationale, however, ignores fundamental distinctions between free over-the-air broadcasting and subscription services such as cable -- distinctions which warrant different levels of First Amendment protection.⁷ As several courts have recognized, in the context of indecency regulation, the basis for distinguishing cable and broadcasting is that free over-the-air broadcasting is a uniquely "pervasive" medium that is "automatic[ally] available to all," while cable, like newspapers and magazines, is a subscription service, received only by persons who specifically order it and are willing to pay for it.⁸ The mere fact that increasing numbers of individuals are voluntarily choosing to subscribe to cable television does not alter this fundamental difference in the character of these two media and in the greater First Amendment protection accorded to cable as a result of this difference.⁹

Furthermore, even as to the narrower issue of the number of children with access to incompletely scrambled (or unscrambled) channels of predominantly sexually-explicit programming in homes where such programming has not been ordered, the Commission may

⁷Indeed, the United States Supreme Court has expressly held not only that cable programmers and cable operators are entitled to the protection of the speech and press provisions of the First Amendment, but also that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable television." Turner Broadcasting System v. FCC, 114 U.S. 2445, 2456 (1994).

⁸See Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1169 (D. Utah 1982); accord Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985), aff'd sub nom. Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), aff'd mem., 480 U.S. 926 (1987); Cruz v. Ferre, 571 F. Supp. 125 (S.D. Fla. 1984), aff'd 775 F.2d 1415 (11th Cir. 1985); HBO v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).

⁹To conclude otherwise would be to suggest that a widely distributed, popular newspaper such as USA Today is entitled to a lesser measure of First Amendment protection than a specialized, niche publication such as Telecommunications Report.

not simply assume that the same safe harbor is applicable in the cable context as in the broadcast arena. There are significant differences between cable and broadcasting that affect the relative presence of children in the audience. For example, as the Notice itself recognizes, approximately one-third of all homes passed by cable do not even subscribe. Moreover, even in cable homes, the instances in which children will accidentally stumble upon indecent programming are likely to be far more limited than in non-cable homes, given the financial incentives for cable operators and programmers to ensure that unordered cable programming is not available for free and the greater ability of parents to control cable viewing. In this regard, it is noteworthy that parents frequently choose not to have cable service connected to television sets located in their children's rooms, thereby reducing the instances in which children have unsupervised access to cable (as opposed to broadcast) service. Because the adoption of an appropriately tailored safe harbor has constitutional implications,¹⁰ the Commission cannot simply assume that the same standard is warranted for cable and broadcasting.

¹⁰See Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995), cert. denied, 116 S.Ct. 701 (1996). Indeed, properly tailoring the "safe harbor" requirement is crucial not only to the constitutionality of efforts to regulate the availability of cable programming, but also to the constitutionality of efforts to restrict broadcast programming. See Action for Children's Television (suggesting that constitutionality of broadcast indecency "safe harbor" is related to unregulated availability of similar programming from other sources, including cable).

V. Conclusion.

Time Warner Cable and Home Box Office share the concerns of Congress regarding the need to protect children from material intended for adult audiences, and particularly from programming shown on channels consisting primarily of sexually-oriented programming. However, as discussed above, the Commission needs to proceed cautiously so as to properly tailor the rules implementing Section 505 so that they do not unduly restrict the availability of programming specifically requested by adult audiences.

Respectfully submitted,

TIME WARNER CABLE
AND HOME BOX OFFICE



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